Joseph Singaram Pillay v Malaysian Bar

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1-24-286-93
ANUAR J
2 JULY 1993

Legal Profession — *Application for sijil annual — Compliance with the Legal Profession Act 1976 — Whether the Bar Council could exempt plaintiff from strict compliance with rules relating to submission of accounts — Legal Profession Act 1976 — The Solicitors Account Rules 1990*

Legal Profession — *Application for sijil annual — Application rejected — Whether Bar Council considered plaintiff's request with care as it involved deprivation of livelihood*

Civil Procedure — *Interim injunction — Application to set aside — Whether court could grant injunction against statutory body — Whether Bar Council's lawful rights were prevented*

The plaintiff was admitted to the Malaysian Bar in 1987 and had since been practising as an advocate and solicitor in Johor Bahru without interruption. In January 1990, he decided to associate with a lawyer in Kuala Lumpur using the firm name of Zaibuddin Ambak and Associates. In December 1991, the association between them ended and the plaintiff changing his style of practice to JS Pillay & Co. The plaintiff applied to the defendant for the issue of the sijil annual, enclosing his 'own' office accounts in Johor Bahru. There were some queries by the defendant regarding the Kuala Lumpur office of the 'firm'.

In response, the plaintiff submitted a statutory declaration and forwarded a redesignated accountant's certificate modifying its title but not the contents, to comply with the formal requirements made by the defendant's secretariat. The defendant wrote to the plaintiff a letter to the effect that the plaintiff's application for the sijil annual could not be considered until he complied with the requirements of the Legal Profession Act 1976 ('the Act') and produced the accountant's certificate of his 'branch office'. The defendant also pointed out to the plaintiff the latter's right to apply to the court under the Act.

The plaintiff contended that the defendant did not make appropriate enquiries before withholding or not issuing the sijil annual. He complained that he was never given the opportunity to exculpate himself before being deprived of his livelihood. It was not easily possible for him to produce the accounts of Zaibuddin Ambak who had been suspended from practice. The plaintiff also averred that he had, at all material times, done his best to trace and persuade his colleague to submit the accounts. The plaintiff applied by originating summons to the court praying that the defendant be directed to issue forthwith to the plaintiff a sijil annual for the year 1993. On the same

occasion, the defendant applied for the interlocutory injunction obtained by the plaintiff against it to be set aside followed by other consequential reliefs.

Held, directing that the injunction be automatically dissolved upon the plaintiff being issued the sijil annual:

(1) The court was of the opinion, after studying minutely the Act and The Solicitors Account Rules 1990, that the defendant has wide discretionary power to exempt the plaintiff from strict requirements of the rules relating to submission of accounts.

(2) On review of the whole evidence, the court was of the opinion that the defendant was merely relying on 'holding out' as the reason for withdrawal of the sijil annual and did not consider the plaintiff's request with the care it deserved although it involved him being deprived of his livelihood indefinitely, causing him loss of his career. The defendant had all the statutory power which it never exercised to check the plaintiff's accounts at its option even without a complaint.

(3) The court's decision was without prejudice to the plaintiff's liability to answer for and satisfy any claim against him on the grounds of holding out as a partner, should a case of that nature arise any time in future.

(4) Whatever be the technical arguments, the injunction was an equitable remedy and the courts had no hesitation in invoking the remedy even against statutory authorities unless forbidden by legislature. Anyway, the injunction was not a validation of wrongful acts of the plaintiff or anyone but was intended to be an order against the defendant from alleged abuse of power in desperate circumstances claimed by the plaintiff in his ex parte application.

Obiter:

Where a statute provides a full right of appeal to a court, as in this case, vide s 34 of the Act, against an official decision, the court should be able to apply its own view of the merits provided it had due regard to the opinions of the authority which made the first decision. While policy is an important guide, no authority must shut its eyes to the individual applicant. In all cases of depriving a man of his livelihood or in frustrating legitimate expectation, fairness is of paramount importance.

[Bahasa Malaysia summary

Plaintif telah diterima masuk ke dalam Majlis Peguam pada tahun 1987 dan sejak itu beliau telah berkhidmat sebagai seorang peguamcara dan peguambela di Johor Bahru tanpa gangguan. Pada Januari 1990, beliau telah membuat keputusan untuk bersekutu dengan seorang peguam di Kuala Lumpur dengan menggunakan nama firma Zaibuddin Ambak and Associates. Pada Disember 1991, persekutuan di antara mereka telah berakhir dan plaintif telah menukar nama firmanya

A kepada JS Pillay & Co. Plaintif telah memohon kepada defendan untuk mendapat sijil annual dengan melampirkan akaun firmanya sendiri di Johor Bahru. Terdapat beberapa soalan oleh defendan berkenaan dengan pejabat Kuala Lumpur firma itu.

Sebagai jawapan, plaintif telah memasukkan suatu deklarasi statutori dan suatu sijil akauntan yang telah dinamakan semula dengan menukar B tajuk tetapi bukan isinya, supaya memenuhi syarat-syarat formal sekretariat defendan. Defendan telah menulis sepucuk surat kepada plaintif menyatakan bahawa permohonan plaintif untuk sijil annual itu tidak akan dilayan sehingga plaintif memenuhi syarat-syarat Akta Profesion Undang-Undang 1976 ('Akta itu') dan melampirkan sijil C akauntan pejabat cawangannya. Defendan juga telah menyatakan hak plaintif untuk memohon ke mahkamah di bawah Akta itu.

Plaintif berhujah bahawa defendan tidak membuat pertanyaan yang wajar sebelum mereka enggan memberi sijil annual itu. Beliau menyatakan bahawa beliau tidak diberi kesempatan untuk membebaskan diri sebelum punca pendapatan beliau dilucutkan. D Adalah tidak mudah untuk beliau mendapat akaun Zaibuddin Ambak yang telah digantung daripada menjalankan praktiknya. Plaintif juga telah berhujah bahawa beliau telah cuba sedaya upaya, pada masa yang penting, untuk mencari dan memujuk rakan sejawatnya untuk menyerahkan akaun itu. Plaintif telah memohon ke mahkamah melalui E suatu saman pemula supaya defendan diperintahkan memberi kepada plaintif suatu sijil annual bagi tahun 1993. Pada masa yang sama, defendan juga telah memohon supaya suatu injunksi interlokutori yang telah diperolehi oleh plaintif diketepikan diikuti dengan relif-relif berbangkit.

F **Held,** memerintahkan supaya injunksi itu dibubarkan secara automatik sebaik sahaja plaintif diberi sijil annual itu:

(1) Makamah berpendapat, selepas mengkaji secara mendalam Akta itu dan Kaedah-Kaedah Akaun Peguamcara 1990, bahawa defendan mempunyai kuasa budi bicara yang luas untuk G mengecualikan plaintif daripada peruntukan-peruntukan kaedah yang tegas berkenaan dengan penyerahan akaun.

(2) Dengan mengkaji semula keseluruhan keterangan, mahkamah berpendapat bahawa defendan hanya bergantung kepada prinsip mengemukakan diri (holding out) sebagai sebab untuk menarik balik sijil annual itu dan tidak menimbang permintaan plaintif H dangan teliti sebagaimana yang sepatutnya walaupun ia bermakna bahawa plaintif akan kehilangan punca pendapatannya untuk masa yang tidak tentu, menyebabkan beliau kehilangan kerjayanya. Defendan mempunyai kuasa statutori yang tidak digunakan olehnya untuk memeriksa akaun plaintif walaupun tidak ada sebarang rungutan mengenainya. I

(3) Keputusan mahkamah adalah tanpa menjejaskan liabiliti plaintif untuk menjawab dan menyelesaikan sebarang tuntutan terhadapnya atas alasan mengemukakan diri sebagai seorang

pekongsi jikalau sesuatu kes sedemikian wujud pada masa depan. A

(4) Walau apapun pertikaian teknikal, injunksi itu adalah suatu remedi ekuiti dan mahkamah tidak berasa berat untuk menggunakan remedi itu walaupun terhadap pihak berkuasa statutori melainkan jika dilarang oleh badan perundangan. Walau bagaimanapun, injunksi itu bukan merupakan suatu pengesahan perbuatan salah B oleh plaintif atau sesiapapun tetapi bertujuan menjadi suatu perintah terhadap defendan daripada tuduhan penyalahgunaan kuasa dalam keadaan yang terdesak seperti yang dinyatakan oleh plaintif di dalam permohonan ex partenya.

Obiter: C

Di mana suatu statut memperuntukkan suatu hak yang penuh untuk membuat rayuan ke mahkamah, seperti di dalam kes ini, melalui s 34 Akta itu, terhadap suatu keputusan rasmi, mahkamah sepatutnya menggunakan pandangannya tentang merit kes itu jika ia memberi perhatian kepada pendapat autoriti yang telah membuat keputusan D pertama itu. Walaupun polisi merupakan panduan yang penting, sesebuah autoriti tidak sepatutnya tidak mengendahkan seseorang pemohon individu. Di dalam semua kes yang melucutkan punca pendapatan seseorang atau yang mengecewakan jangkaan sah, keadilan adalah paling utama.]

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[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–347–93.]

Cases referred to

1 *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph* [1993] 2 MLJ 57 (distd) F
2 *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614; [1971] 2 All ER 1441; [1971] 3 WLR 133 (refd)
3 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610; [1970] 3 All ER 165; [1970] 3 WLR 488 (refd)
4 *Lau Liat Meng v Disciplinary Committee* [1967] 2 MLJ 141 (refd) G

CKG Pillay (*S Kanawagi* with him) (*CKG Pillay & Partners*) for the plaintiff.

C Abraham (*Maidzuara Mohammed* with him) (*Shearn Delamore & Co*) for the defendant.

H

Anuar J: On 13 May 1993, the court heard the above originating summons praying that the defendant be directed to issue forthwith to the plaintiff a sijil annual for the year 1993. On the same occasion, the court heard an application by the defendant that the interlocutory injunction against it granted on 5 April 1993, be set aside followed by other consequential I reliefs. Both matters were heard together for the sake of expediency and as the facts and affidavits were closely interlinked. Upon conclusion of the hearing, I reserved judgment to study in depth the facts and law involved in

A view of the importance of the decision to the legal profession and the case being first of its own kind to my knowledge.

Subsequent to the hearing on 13 May 1993, counsel for the defendant sent to me a copy of the Supreme Court decision in *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph*.[1] With due respect to the learned counsel, I cannot derive much assistance from the said judgment which relates to a B different subject and which appears as a guide only for the interpretation of ss 98 and 99 of the Legal Profession Act 1976 ('the Act').

First, in the sequence of events, I will deal with the plaintiff's prayer followed by that of the defendant's.

The plaintiff was admitted to the Malaysian Bar as an advocate and C solicitor on 25 April 1987. Since then, he has been practising as an advocate and solicitor in Johor Bahru in various capacities without interruption. In January 1990, he decided to associate with another senior lawyer, Zaibuddin Ambak in Kuala Lumpur. The true nature and extent of such association are in dispute except that both lawyers used the firm name of Zaibuddin Ambak and Associates.

D In December 1991, the association between them ended, the plaintiff changing his style of practice to JS Pillay and Co.

On 30 November 1992, the plaintiff applied to the defendant for the issue of the sijil annual in question in the prescribed manner enclosing his 'own' office accounts in Johor Bahru. There were some queries by the E defendant regarding the Kuala Lumpur office of the 'firm'. In response, the plaintiff submitted a statutory declaration on 12 February 1993. He also had occasion to forward a redesignated accountant's certificate modifying its title but not the contents at all, to comply with the formal requirements made by defendant's secretariat.

Finally on 18 March 1993, the defendant wrote to the plaintiff a short F letter to the effect that the defendant was of the view that plaintiff's application for sijil annual could not be considered until he 'complies' with the requirements of the Act and produce the accountant's certificate of his 'branch office'. The defendant also pointed out to the plaintiff the latter's right to apply to the court under the Act, leading therefore to the present G originating summons.

In the main, the contention of the plaintiff is that the defendant did not make appropriate enquiries before withholding or not issuing the sijil annual. He complained that he was never given the opportunity to exculpate himself before being deprived of his livelihood. It was not easily possible for him to produce the accounts of Zaibuddin Ambak, who was suspended H from practice by the Chief Justice at the instance of the Bar without the plaintiff being aware of the situation leading to such an action. The plaintiff also averred that he had, at all material times, done his best to trace and persuade his colleague to submit the accounts but was unlikely or impossible to succeed.

I Insofar as the plaintiff was concerned, he has accounted for all moneys received from his clients and that there were no complaints against him since his practice. His counsel relied on common law indicating the individual liability of each lawyer in such a situation. In reply, the defendant averred

that the plaintiff was a partner of the firm Zaibuddin Ambak and Associates by his own admission at an earlier stage. The defendant did not rebut or question the plaintiff's statement on oath that he was not aware of any action in Kuala Lumpur which his associate took and he was not in a position to be so aware.

At the hearing of this action, the plaintiff relied on two affidavits sworn on 5 May 1993 (encl 1) and 10 May 1993 (encl 2) but they are verbose and irrelevant in many instances for my decision.

The points of law involved are what should be the guiding principles before I exercise my jurisdiction one way or the other.

Where a statute has provided a full right of appeal to a court, as in this case, vide s 34 of the Act, against an official decision, the court should be able to apply its own view of the merits provided it has due regard to the opinions of the authority which made the first decision. Dictum in *Sagnata Investments Ltd v Norwich Corporation*[2] and many other cases in similar vein leads me to this interpretation. The same authority and many other case law including *British Oxygen Co Ltd v Minister of Technology*[3] states that any administrative authority must not apply its policy so rigidly without hearing as to what an individual applicant had to say as exceptional features of his case. While policy is an important guide, no authority must shut its eyes to the individual applicant.

Another aspect of law is that in all cases of depriving a man of his livelihood or in frustrating legitimate expectation, fairness is of paramount importance as emphasized in *Lau Liat Meng v Disciplinary Committee.*[4] Bearing these principles of law in mind, I now wish to review the sole question ie whether the plaintiff's application for the sijil annual should be withheld.

To decide this issue, it is not necessary for me to arrive at any finding as to the nature of the disputed partnership relationship. Whatever may be my decision regarding the sijil annual, it does not prejudice the right of any party to seek recovery from the plaintiff if there is ample evidence of him holding out or being a partner otherwise a competent court decides so.

These are hypothetical situations, even though one year and a few months have elapsed since the alleged partnership or association ceased, with no sight of such claims yet. The first question for me to consider is whether the plaintiff is bound in all the circumstances to procure an accountant's certificate for his colleague, Zaibuddin Ambak. Insofar as the plaintiff is concerned, he had accounted for all the moneys received from clients he attended, the primary object of legislation. In his affidavit sworn on 12 February 1993, among other things, the plaintiff stated that he was never a signatory to either the office account or clients' account of the Kuala Lumpur office and vice versa, meaning the office of Zaibuddin Ambak, who engaged auditors different from those of the plaintiff. He vehemently disclaims any definite arrangement of partnership, each lawyer minding his own practice alone.

I now pause to decide whether the defendant could have considered carefully the exceptional features of the plaintiff's reasons for not being able to produce his colleague's account. Its only response was that the plaintiff

A did not comply with the Act.

Similarly, in his affidavits, the plaintiff alleged that the defendant denied justice by not making any enquiry at all. In this context, I am of the opinion, after studying minutely the Act and The Solicitors Account Rules 1990, that the defendant has wide discretionary power to exempt the plaintiff from the strict requirements of rules relating to submission of accounts.

B The defendant ought to know that separate accounts were kept for two legal establishments of the same firm, the one in Kuala Lumpur and the other in Johor Bahru, having accepted this format in the preceding year.

Although I feel that the plaintiff's second affidavit dated 10 May 1993 is too verbose and irrelevant in some instances, I cannot ignore what he swore

C in p 11, para 16(b) of his second affidavit. He stated that there was at least one case of a lady lawyer being issued a sijil annual without an accountant's certificate probably for good reason but based on her undertaking or some private arrangements made between her and the Bar Council. Although the name of the lawyer was revealed during the hearing, the defendant's counsel was not able to rebut the statement.

D On review of the whole evidence, I am of the opinion that the defendant was merely relying on 'holding out' as the reason for withdrawal of the sijil annual and did not consider the plaintiff's request with the care it deserved although it involved him being deprived of his livelihood indefinitely, causing him loss of his career. The defendant has all the statutory power

E which it never exercised to check the plaintiff's accounts at its option even without a complaint.

There is no evidence that withholding the sijil annual will serve anyone's interest and will promote the cause of justice. If for any reason, it is adjudicated that the plaintiff has to pay for the 'firm's' liability, of which I have no evidence except that the accounts for the year 1991 for Zaibuddin

F Ambak's office has not been submitted, it will only serve the public interest if the plaintiff continues in gainful employment. In deserving cases, even bankrupt lawyers have been allowed to practice by the courts and I find no reason why the same consideration cannot be given to one in the plaintiff's situation.

G Further, there has been no rebuttal of evidence that the plaintiff has an unblemished character as a professional for almost six years and there has been no complaint from any source to date involving him. There is no suggestion of his involvement in the affairs of Zaibuddin Ambak whose history remains a missing link in this episode.

I therefore grant the plaintiff's prayer for issue of the sijil annual. I must

H however emphasize that my decision is not to be construed as a precedent. Each case is decided upon its particular facts. There may be cases of lawyers associating with each other, whatever be the label, where one party is aware of the unprofessional conduct or misdeeds of the other or at least has cause to be alert and to be put on enquiry. In such cases, the court will

I take a different approach consistent with requirements of justice.

It must also be pointed out that my decision is without prejudice to the plaintiff's liability to answer for and satisfy any claim against him on the grounds of holding out as a partner or otherwise, should a case of that

nature arise any time in future. Similarly, the defendant is at liberty to initiate such disciplinary action against the plaintiff, as it deems fit, if adequate grounds exist under the Act. Withholding or non-issuance of the sijil annual is not the solution. The effect is equivalent to suspending a lawyer, which is the prerogative of the Chief Justice only at the instance of the Bar.

Now, I shall deal with the question of setting aside the interlocutory injunction as prayed by the defendant. I need not repeat the claimed desperate circumstances in which the plaintiff approached this court ex parte. The main and substantial ground of the defendant's objection is that the injunction was contrary to law. It fetters the hands of the defendant in the lawful pursuit of its functions and objectives.

While the injunction was undoubtedly justifiable in principle, the propriety of the wording of the order, drafted by the plaintiff's counsel was arguable in that he slavishly followed the stereotyped format. If the expression 'without leave of the court' had been added at the appropriate place in the text before restraining the defendant, there could have been no room at all for challenge. Practically speaking, if the defendant thought that the exercise of its lawful rights were prevented, it could have forthwith approached the court and the situation could have been rectified, if justified, upon hearing full arguments inter partes. In any case, the interim order was only of absolutely temporary nature and there was no instance of any prejudice at all.

In this case, the whole exercise was purely academical and hypothetical in view of my decision in the originating summons. Yet, I cannot help observing that although the injunction was made on 5 April 1993, and possibly served on the defendant that or the next day, no application or approach to set aside was made until 22 April 1993. Meanwhile, on 20 April 1993, the defendant choose to interpret the validity of the interim order and to advise one of the parties granted relief, impliedly challenging it and apparently frustrating the object. The whole situation appears purely theoretical with nothing really happening during the span of the past few days.

Whatever the technical arguments may be, the injunction is an equitable remedy and the courts have no hesitation to invoke the remedy even against statutory authorities unless forbidden by legislature, as in the case in *Lau Liat Meng v Disciplinary Committee*.[3] Anyway, the injunction was not a validation of wrongful acts of the plaintiff or anyone but was intended to be an order against the defendant from alleged abuse of power in desperate circumstances claimed by the plaintiff in his ex parte application.

In all the circumstances, I overrule the objection of the defendant but direct that the injunction be automatically dissolved upon the plaintiff being issued a sijil annual.

I further order that each party bears its own costs in the matter.

Order accordingly.

Reported by Jeanne Tan